

Statement of Reasons in Support of Amendments to Sections 22a-66-1, 22a-66-5, 22a-66a-1, 22a-66z-1 and 23-61a-1 to 23-61a-7 inclusive, of the Regulations of Connecticut State Agencies.

This Statement of Reasons concerns proposed amendments to the regulations regarding certification of pesticide applicators, notification of pesticide application and licensing of arborists. These regulations are promulgated under the Connecticut Pesticide Control Act (Chapter 441 of Connecticut General Statutes) and section 23-61a of the Connecticut General Statutes, concerning the licensing of arborists.

I. Introduction

The proposed amendments would revise certain sections of the state's pesticide management regulations as well as regulations concerning the licensing of arborists. The purpose of these regulations is to ensure that work performed by pesticide applicators and arborists is conducted in a manner that does not adversely impact human health or the environment.

The proposed revisions a) make technical corrections to the language and format of the regulations for clarity and program consistency; b) create a new class of operator which will be authorized to make decisions in the field by referring to a manual of written instructions from a supervisor; c) allow the commissioner to issue aquatic chemical permits for a period of up to three years which will reduce the administrative burden on both the Department of Energy and Environmental Protection (Department) and permit applicants; d) clarify the content and format of signs that are required to be posted when pesticide applications take place to ensure that pesticide notification language is clear and obvious; and e) amend the arborist licensing regulations to make the regulatory language consistent with statutory language and to reflect fee increases recently imposed by statute.

II. Opportunity for Public Participation by Interested Parties

Notice of Intent to Adopt Regulations was published April 17, 2012 in the Connecticut Law Journal. In addition, this notice was directly sent to those parties who have requested such notice or would be affected by the proposed amendments. A hearing was requested by more than 25 persons prior to the

close of the comment period, which ended May 17, 2012. Accordingly a hearing was held on July 23, 2012 at 1:00 P.M. in the Russell Hearing Room at Department headquarters, 79 Elm St., Hartford CT. This document summarizes the comments received by the Department during the comment period and hearing, including those in support of and in opposition to the amendments of the regulations, the Department's response to these comments, as well as the resulting amendments being made by the Department, if any, and the rationale for any such revisions. Language in the proposed amendments to the regulations not specifically revised in this Statement of Reasons has been finalized as proposed.

III. Summary of Comments Received

The Department received written comments from The Connecticut Groundskeepers Association (CGKA), oral comments from Lauralyn Lewis and both oral and written comments from Jerome Silbert on behalf of the Watershed Partnership, the Connecticut Environmental Council (CTEC), Margaret Miner on behalf of the Rivers Alliance, Richard Berman on behalf of Waltham Services, and Attorney Janet Brooks.

Comment: Commenters CGKA and CTEC were generally supportive of the amendments and did not offer comments with respect to specific changes.

Comment: Commenters Silbert and Miner questioned the timing of the proposed amendments, stating that since there are ongoing discussions about statutory changes, the proposed regulatory changes are premature.

Response: The proposed amendments have been in development for many years. Therefore, the Department believes that it is appropriate to proceed with these amendments at this time rather than wait on the 2013 legislative session for statutory changes that may or may not be made. Since statutory requirements take precedence over regulatory requirements, should a statutory change in the future conflict with an existing regulation, the new statutory requirement would become law and the Department would revise the regulations at that time to resolve the discrepancy.

Comment: Several commenters (Silbert, Lewis, Miner) spoke in favor of differentiation of the posting signs. Commenters suggested that signs for lower toxicity pesticides and higher toxicity

pesticides could have different background colors and signs for higher toxicity pesticides should be required to provide more information.

Response: The amount of information imparted by a posting sign is necessarily limited by the format. The proposed amendments, which set a specific sign and font size, and limit the contents of the sign to specific information were proposed due to the proliferation of posting signs with extraneous information or much larger font size for the application company resulting in the sign functioning as an advertisement. The warning message was thus being diluted, and the Department felt that the signs needed to be standardized in order to provide a uniform message. While it is certainly true that some pesticides are more toxic than others, a reliable index to indicate such toxicity has not been presented. If such an index can be promulgated, there would also need to be consensus on what value would be set to determine which type of sign could be used. Arbitrary distinctions which would substitute for such an index, such as organic versus synthetic, may not have any relation to actual hazard since some natural products have strong odors, some may be allergenic, and many have little data on their toxicity. The Department is not making any revisions to the regulation in response to this comment.

Comment: Commenter Berman stated that posting should not be required for minimal pesticide applications, such as applications around the perimeter of a dwelling, or an enclosed application of a rodenticide.

Response: Section 22a-66a(c) of the Connecticut General Statutes requires posting of all outdoor applications of pesticides, but provides specific exceptions. Since the exceptions requested by the commenter are not included in the statute, and the Department cannot adopt a regulation that conflicts with a statute, the Department cannot make the requested change to the proposed regulations. A statutory change would be required. As such, no change is being made to the rule as proposed

Comment: Commenter Miner expressed concern about a three year duration for an aquatic pesticide permit, noting that the condition of a waterbody could change from year to year.

Response: The three year time period is at the commissioner's discretion, so not all permits will have this duration. More complex lakes are likely to continue to have one year permits. In addition, the Department can always modify or revoke an existing permit if conditions warrant.

Comment: Commenters Brooks and Miner stated that annual reporting of aquatic applications should continue, even if the permit duration is three years.

Response: The Department agrees with these commenters, and the proposed language has been revised and finalized as follows:

Section 22a-66z-1(e) as proposed:

(e) [Permits shall be valid for one year following the date of issuance.] The commissioner shall indicate the date of expiration on the permit. The expiration date shall not exceed three calendar years after the date of issuance.

Section 22a-66z-1(e) as finalized:

(e) [Permits shall be valid for one year following the date of issuance.] The commissioner shall indicate the date of expiration on the permit. The expiration date shall not exceed three calendar years after the date of issuance. The permittee shall report the use of the pesticides allowed under each permit to the commissioner no later than January 31 of the year following application.

Comment: Commenters Brooks and Miner felt that there needed to be better distinction between junior and senior operators, since much of the same information was required on the written instructions to either class. Ms. Brooks also noted that the instructions needed to be in possession of the applicator at the time of application, and that senior operators should have the explicit authority not to apply a pesticide, and that the reasons include potential risk of harm (for both junior and senior operators). She also noted that the regulations specifically allow written instructions in electronic form, but that such electronic instructions must be capable of being given to Department staff during an inspection. She noted in addition that “or address” should be deleted from the senior operator instructions since it is redundant.

Response: Written instructions will still be required for both classes, but the important distinction is that junior operators’ instructions are place specific: they must have all the pertinent information for each place – including pest and site. If a pest or site not noted on the instructions needs treatment, the junior operator would need to obtain revised written instructions from the supervisor in order to treat the pest, or have the supervisor appear at the site. The instructions for the senior operators will also have much the same information required, but they will be pest based, leaving the senior operator with the ability to identify the pest, then refer to his or her instructions (likely in a manual form) to treat the pest. The senior operators’

instructions still need to have the place identified, which will keep treatment at an incorrect address (place) as a violation of the instructions.

The Department agrees that the instructions must be in the possession of an operator (junior or senior) at the time of application and that they have authority not to apply a pesticide. The Department also agrees that instructions may be in electronic format, but must be available to staff during an inspection. The Department is also correcting a reference to commercial applicator in this section, where senior operator is more appropriate. The proposed language has been revised and finalized as follows:

Section 22a-66-5(i)(1)(B) as proposed:

[(2)] (B) where labeling does not require the presence of a certified supervisory applicator at the site of application, the certified supervisory applicator [must] shall either be present at the time of application or [must] provide written instruction to the certified operator [that shall include the certified supervisor's name and certification number, the certified operator's name and certification number, the pest to be controlled, the pesticide to be used, directions for use of the pesticide, and be available if and when needed].

Section 22a-66-5(i)(1)(B) as finalized:

[(2)] (B) where labeling does not require the presence of a certified supervisory applicator at the site of application, the certified supervisory applicator [must] shall either be present at the time of application or [must] provide written instruction to the certified operator [that shall include the certified supervisor's name and certification number, the certified operator's name and certification number, the pest to be controlled, the pesticide to be used, directions for use of the pesticide, and be available if and when needed]. The written instructions may be delivered to the certified operator in electronic form. If the instructions are delivered in electronic form, they shall be made available in printed form or electronically transmitted to the commissioner or the commissioner's representative at the time of an inspection of the operator or the operator's business. The written instructions shall be in the possession of the certified operator at the time of application.

Section 22a-66-5(i)(1)(B)(i)(II) as proposed:

(II) A junior operator may choose not to treat the site or place if there are no pests present or if conditions present an increased risk of harm if pesticides are used.

Section 22a-66-5(i)(1)(B)(i)(II) as finalized:

(II) A junior operator may choose not to apply a pesticide if there are no pests present or if conditions present a potential increased risk of harm if pesticides are used.

Section 22a-66-5(i)(1)(B)(ii)(I) to (III), inclusive, as proposed:

(ii) (I) Written instructions for use of a pesticide provided to a senior operator shall include the certified supervisor's name and certification number, the certified operator's name and certification number, the address or place of application, and the directions for control of each pest expected to be encountered at the place. The directions for control of a pest shall include, but not be limited to, the pesticide or pesticides to be used, the dilution rate, if applicable, of the pesticide and method of application. A commercial applicator may maintain the directions for control of a pest as a reference for future applications at multiple places.

(II) The written instructions provided to a senior operator shall be limited to the category of the pests or sites covered in which the senior operator is certified.

(III) For the purposes of each pesticide application, a senior operator who is not certified to apply a particular category of pesticide shall be considered a junior operator.

Section 22a-66-5(i)(1)(B)(ii)(I) to (III), inclusive, as finalized by adding subclause (IV), deleting “address” in the first sentence and replacing “commercial applicator” in the last sentence of 22a-66-5(i)(1)(B)(ii) with “senior operator”:

(ii) (I) Written instructions for use of a pesticide provided to a senior operator shall include the certified supervisor's name and certification number, the certified operator's name and certification number, the [address or] place of application, and the directions for control of each pest expected to be encountered at the place. The directions for control of a pest shall include, but not be limited to, the pesticide or pesticides to be used, the dilution rate, if applicable, of the pesticide and method of application. A senior operator may maintain the directions for control of a pest as a reference for future applications at multiple places.

(II) The written instructions provided to a senior operator shall be limited to the category of pesticide application in which the senior operator is certified.

(III) For the purposes of each pesticide application, a senior operator who is not certified to apply a particular category of pesticide shall be considered a junior operator.

(IV) The senior operator may choose not to apply a pesticide if there are no pests present or if conditions present a potential increased risk of harm if pesticides are used.

Comment: Commenter Berman stated that senior operators should not be required to have written instructions. They should be told just to follow the label. Mr. Berman also stated that

requiring a supervisor to be present at an application site within 2 hours of being contacted by an operator is unreasonable since electronic communication allows for constant contact.

Response: Pesticide labels are the legal basis for use of pesticides in the state and country, but they often have multiple options for treating a pest or site. Choosing which of these options is appropriate is the job of the certified supervisor. The operator, even a senior operator, will not have demonstrated the competence to make this decision. While electronic communication has proved to be a boon to service industries such as pesticide applicators, eliminating the requirement for a supervisor to be on site within a reasonable time period would invite abuse. The supervisor could be anywhere in the country or the world and have no idea whatsoever of local conditions or how to handle an emergency. No changes are being made to the regulation in response to this comment.

Comment: Commenter Brooks noted some definitional changes that would add clarity: adding more detail (unit number and town) to the definition of “place”, and further defining “site”. In addition, Ms. Brooks suggested that the business, rather than the supervisor, should be required to retain the instructions as part of the record.

Response: The Department agrees with these comments. In addition, the Department is correcting an incorrect citation reference in section 22a-66-5(i)(3). The reference to section 22a-58(d) should be 22a-66g. The proposed language has been revised and finalized as follows:

Sections 22a-66-1(b)(5) and (6) as proposed:

(5) “Place” means the address at which a pesticide is to be applied;

(6) “Site” means the specific part of the place to which a pesticide is to be applied; and

Sections 22a-66-1(b)(5) and (6) as finalized:

(5) “Place” means the street address, unit number (if applicable) and municipality at which a pesticide is to be applied;

(6) “Site” means the specific location at the place to which a pesticide is to be applied. Site shall be specifically designated so it is clear which of the instructions on the pesticide label are to be followed; and

Section 22a-66-5(i)(3) as proposed

(3) A commercial applicator shall retain the written instructions provided to the operator as part of the records described in section 22a-58(d) of the Connecticut General Statutes.

Section 22a-66-5(i)(3) as finalized:

(3) A pesticide application business shall retain the written instructions provided to the operator as part of the records described in section 22a-66g of the Connecticut General Statutes.

There were several comments that were judged to be outside the scope of the regulatory amendments since they either were not addressed in the proposed amendments or would require a statutory change. These include: a request for records to be obtained and posted for all applications, increased penalties for pesticide application at the wrong address, and further regulation of methods of application such as mosquito misters.

October 12, 2012

Date

/s/ Bradford R. Robinson

Bradford R. Robinson
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